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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of Missouri Pacific Railroad Company, a Corporation, *Petitioners,*

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

PETITIONERS' REPLY BRIEF.

H. H. LARIMORE,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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COMMENTS ON RESPONDENT'S STATEMENT AS TO JURISDICTION.

Respondent in discussing the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri makes the point that the decision in question rested in part on non-federal grounds broad enough to support the judgment of the Missouri Court.

The Supreme Court of Missouri was required to pass upon the defense interposed by respondent that the payment of the money sought to be recovered was voluntary. This involved a construction of Section 16 of the Interstate

Commerce Act (U. S. Code, Title 49, Section 16). The Court construed said Section 16—and held the payment voluntary.

It then proceeded to hold that by reason of such *voluntary* payment petitioners had led respondent to believe that the litigation was ended and that respondent could safely pay its traffic counsel.

It will thus be seen that the entire decision of the Supreme Court of Missouri rested upon its finding that the payment made was voluntary.

Had that Court held that the payment in question was involuntary, as contended by petitioners, there would have been no room in the case for the doctrine of estoppel or changed condition. This is elementary.

In addition to the foregoing, petitioners contend that in order to prevent unjust discrimination, favoritism and inequality, forbidden by the Interstate Commerce Act, they are entitled to recover the amounts paid. This is a Federal question, in the decision of which no consideration can be given to any state rule of estoppel or changed condition.

COMMENT ON STATEMENT OF CASE BY RESPONDENT.

Respondent calls the action one for money had and received. An examination of the petition (R. 5) shows that petitioners alleged, in substance, that respondent prosecuted a suit before the Interstate Commerce Commission, and, obtained an award of damages against Missouri Pacific Railroad Company and others—which upon respondent's demand was paid. Thereafter, the Commission held its action to have been in error, and set aside such award, whereupon petitioners demanded the return of the money paid, and upon respondent's refusal to return brought suit to recover it.

Respondent refers to the fact that the award was paid in April, 1929, and that return of the money was not de-

manded until October 30, 1934 (R. 109). It does not state to this Court that the award in question was not set aside by the Commission until July 3, 1933, and that the hands of the carrier were tied until the award had been vacated (R. 50).

COMMENT ON ARGUMENT OF RESPONDENT.

The argument of respondent commencing at page 6 of its brief on the question of jurisdiction, will be only briefly referred to, as we have heretofore discussed the question of jurisdiction.

Respondent at page 6 of its brief states that the Supreme Court of Missouri holds "(1) that the payments made were voluntary, and (2) that the payments were made under circumstances which estopped petitioners from recovering, and that under the facts it would be inequitable and unjust to require the defendant to pay the money to petitioners."

The foregoing is inadvertently inaccurate. The Supreme Court of Missouri did not make two findings, one to the effect that the payments were voluntary and another to the effect that without regard to whether the payments were voluntary or involuntary petitioners were estopped from recovering them.

The Missouri Court held the payments voluntary and applied the doctrine of estoppel because it found they were *voluntary*.

Also at page 6 of its brief respondent argues that what constitutes a voluntary payment is a matter of general law and cites some Missouri decisions.

It is obvious that whatever legal principle this Court may invoke, a determination of the question here presented involves the construction of Section 16 of the Interstate Commerce Act, and the best that can be said for a Missouri decision is that it might be persuasive.

At page 7 of its brief respondent refers to what it calls "the second ground" on which the lower Court based its decision, again discussing the question of estoppel.

In the interest of accuracy we state there is no "second ground". As shown by the excerpt from the opinion of the lower Court appearing on said page 7 of respondent's brief, the Supreme Court of Missouri held that by reason of its prior finding that the payments were *voluntary*, the doctrine of estoppel applied.

At page 15 of respondent's brief it is stated in substance that the opinion of the lower court would lead to the conclusion that the Court's decision was primarily based on the proposition that the "circumstances" were such as to estop the petitioners from recovering. The "circumstances" referred to are that the Court found that the payments were voluntary, and that by reason of such voluntary payment petitioners are estopped.

If such payments are not voluntary, then the "circumstances" disappear from the case.

Respondent makes no reference to the point made by petitioners at page 19 of their brief, to the effect that a holding that petitioners are entitled to recover the money sued for would be in accord with the purposes of the Interstate Commerce Act. Also since respondent paid rates found reasonable by the Commission, the retention by respondent of a large sum of money in addition thereto would violate the real purpose of the Act.

Respectfully submitted,

H. H. LARIMORE,
Counsel for Petitioners.